Supreme Court, U. S.
FILED
MAY 8 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1977

No. 77-1273

BLANCHE HAWN, et al.,

Petitioner,

vs.

COUNTY OF VENTURA,
CALIFORNIA,

Respondents.

PETITIONER'S REPLY BRIEF

(IN SUPPORT OF PETITION
FOR WRIT OF CERTIORARI)

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I.
RESPONDENTS' SUGGESTION THAT THE DECISION BELOW STRIPPING COUNTIES OF THEIR LAND REGULATORY POWERS IS UNIMPORTANT, CANNOT BE SERIOUSLY ADVANCED.

In what is probably the most telling infirmity of respondents' position, they try to gloss over the fact that by the

decision below the half million inhabitants of an entire populous county were stripped of their constitutional right to control land uses (East Lake v. Forest City Enterprises, Inc. (1976) 426 U.S. 668), by a clearly wrong interpretation of the Constitution. Moreover, respondents ignore the stare decises effects of this decision which, if permitted to harden into precedent, will surely wreak similar havoc on all other California counties.

The opinion below holds (Opinion, Pet. Cert., p. A-27) that the Constitution prevents a county from banning noxious land uses in its own residential areas unless the county performs the legal and political impossibility of simultaneously banning like land uses in incorporated city areas over which the county lacks jurisdiction!

If a county wants to ban airports in its residential areas, what is it supposed to do? A fortiori what is to be done in, say, Los Angeles County which contains over 30 incorporated cities within its boundaries? If that is not a

matter of grave widespread importance, one is at a loss to say what would qualify.[1/]

When the Court below invalidated Section 2 on the grounds it did, it transformed the Equal Protection Clause into a classic "Catch-22": The Constitution forbids a county from regulating its own noxious land uses unless it does the same for cities, but the catch is that the county cannot regulate cities' land at all. If that is what the Constitution says, that is important -- to every county in the Nation, and then some.[2/]

1/ Using respondents' logic one would say that Belle Terre v. Boraas was a trifling matter involving six students' housing problems, New Orleans v. Dukes involved a lone pushcart peddler, East Lake was a local hassle over how to develop one parcel of land in a small town in Ohio, and Marbury v. Madison was no more than a petty squabble over political spoils, between outgoing and incoming administrations.

2/ The "logic" involved here would also compel the conclusion that, say, Maryland may not adopt a superior land title recordation statute to protect its landowners from fraudulent land

(continued)

II.

THERE ARE NO INDEPENDENT STATE GROUNDS SUPPORTING THE DECISION OF THE COURT OF APPEAL.

The problem with respondents' argument is that they seem to be rearguing this case as they presented it to the trial court, rather than the case decided by the Court of Appeal.

Petitioners suggest that for respondents to find themselves driven to a search of the opinion below for nonexistent statutory "independent state grounds" is tantamount to a concession of the indefensible nature of the federal constitutional law propositions which they espouse. The Court of Appeal could not have been clearer; having found the pertinent portions of the Ordinance unconstitutional as denying equal protection of the laws, the court below said:

2/ (continued)

transactions, because that would deny equal protection to landowners in the District of Columbia which is not subject to Maryland's legislative authority.

". . . we find it unnecessary to consider other issues pertaining to the validity of the ordinance -- determined by the trial court and raised by the parties" (Pet. Cert. at p. A-26).

Thus, nonconstitutional matters ineluctably were not considered below.

As for the balance of respondents' arguments on this point, simple perusal of the opinion belies them. The sole authority relied on by the Court below for its substantive constitutional holding (as to Section 1 of the Ordinance) was federal constitutional law -- specifically Reynolds v. Sims (1964) 377 U.S. 533 (see Opinion, Pet. Cert. at p. A-23), and -- incredibly -- Town of Lockport v. Citizens for Community Action (1977) ___U.S.___, 51 L.Ed.2d 313, 97 S.Ct. 1047.3/

3/ The reference by the court below to state constitutional case law had to do with applicability of the "strict scrutiny" vs. "rationality" standards of review. (See Opinion, Pet. Cert., pp. A-17 - A-22).

Respondents' argument is refuted by the very authority they rely on: Jankovich v. Indiana Toll Road Commission (1965) 379 U.S. 487. In Jankovich the Indiana Supreme Court had explicitly construed that state's eminent domain constitutional provisions as well as state statutory property rights possessed by a landowner in the airspace above his land. See Indiana Toll Road Commission v. Jankovich (1963) 193 N.E.2d 237, 239 [244 Ind. 574]. Thus, in Jankovich, unlike the case at bench, there was express state court reliance on state law.[4/] In the case at bench, on the other hand, the substantive analysis is wholly based on federal constitutional law.

4/ The Indiana Supreme Court first analyzed the issue before it in terms of state law, and having reached its conclusion thereon, added that "The Supreme Court of the United States also has given recognition to property rights in air space accruing to the owner of the land beneath" (Ibid., emphasis added), and went on to buttress its decision by a discussion of federal law as well as the law of other states.

Accordingly, petitioners refrain from debating here the various nonconstitutional matters expounded at such length by respondents, matters which were never so much as mentioned, much less decided, by the Court of Appeal. Respondents are in error as a matter of state law as well, and very likely the court below sought to justify its result on constitutional grounds because other suggested bases were even shakier.[5/] Suffice it to say that respondents omit any mention of California law (California Government Code §60485 et seq.) which makes regulation of land use near county airports a local -- not state -- matter, and which

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5/ It is familiar law, followed in California as elsewhere, that constitutional issues are decided last, after other issues prove to be nondispositive of the controversy (for an extensive collection of California case law reiterating this rule, see 13 Cal.Jur.3d, Constitutional Law, §57, pp. 106-107). Thus, the fact that the Court of Appeal discussed only the constitutional issue eloquently bespeaks that court's evident conclusion that respondents' nonconstitutional arguments in defense of the trial court's judgment were erroneous and were thus nondispositive of this controversy.

confers on counties the power to zone near county airports.

III.

RESPONDENTS' "INDEPENDENT STATE GROUNDS" ARGUMENT REDUCES THE NOBLE CONCEPT OF FEDERALISM TO A SEMANTIC GAME.

As already noted, respondents' "independent state grounds" argument flies in the face of the clear language of the opinion of the Court of Appeal. However, it should also be emphasized that respondents have gone beyond that, and managed to reduce the doctrine on which they thus purport to rely to a semantic game.

It is one thing for a state court to interpret its own Constitution and to elucidate a policy justifying its own treatment of the local organic law, after noting its distinct interpretational powers in the exercise of its perception of sound federalsim (see e.g., People v. Disbrow (1976) 16 Cal.3d 101, 114-115, and compare dissent of Richardson, J.,

16 Cal.3d at 118-121 [127 Cal.Rtpr. 360, 545 P.2d 272]).

It is something altogether different to say -- as do respondents -- that merely because an opinion mentions in passing that a law is unconstitutional on both state and federal grounds (Resp. Br., p. 8), that somehow insulates state courts from further review by this Court, even though the substantive constitutional analysis of the decision below rests entirely on federal constitutional law contained in case authorities decided by this Court. The upshot is an Alice-in-Wonderland rule whereby a state court gets to interpret and apply this Court's opinions, while simultaneously rendering this Court impotent to do anything about manifest misapplications of those decisions!

IV.

RESPONDENTS' SEVERABILITY ARGUMENT MISREPRESENTS CALIFORNIA LAW WHICH IN FACT IS THE SAME AS THAT FOLLOWED BY THIS COURT.

Respondents' argument concerning severability (Resp. Br., pp. 23-27) is disingenuous; it ignores the most recent and most authoritative decision in which the California Supreme Court expressly endorsed the same standards of severability as those followed by this Court; see Santa Barbara School Dist. v. Superior Court (1975) 13 Cal.3d 315, 330 [118 Cal.Rptr. 637, 530 P.2d 605]:

> ". . . 'in considering the issue of severability, it must be recognized that the general presumption of constitutionality, fortified by the express statement of a severability clause, normally calls for sustaining any valid portion of a statute unconstitutional in part. This is possible and proper where the language of the statute is mechanically severable, that is, where the valid and invalid parts can be separated by paragraph, sentence, clause, phrase, or even single words. . . .". (Emphasis by the court.)

Whether viewed under the above standards, or under this Court's substantially same ones (see authorities collected at Pet. Cert., pp. 28-30), the holding below on severability seriously disrupts the fabric of prevailing constitutional law.

V.

RESPONDENTS' NOTIONS OF CONSTITUTIONALITY OF SECTION I OF THE ORDINANCE WERE EXPRESSLY REJECTED BY THIS COURT 50 YEARS AGO, AND ARE INCONSISTENT WITH SETTLED CONSTITUTIONAL DOCTRINE.

Respondents argue that a land use regulation involving referendum or initiative is constitutionally wanting unless the franchise is distributed with "precision" to those "primarily affected". If accepted, this ingenious argument would, of course require the overruling of East Lake v. Forest City Enterprises (1976) 426 U.S. 668. There, a constitutional challenge was mounted to a land use ordinance adopted by the entire city's electors, changing zoning of one

particular parcel of land. Manifestly, only a relative handful of the East Lake populace was "primarily affected" by the apartment proposed to be built on the single subject parcel. Yet a city-wide referendum was held proper. Indeed, the sort of conceptual mini-district "precise" limitation of the franchise to those in the immediate vicinity of the controversial land use, was rejected by this Court in Washington ex rel Seattle Trust Co. v. Roberge (1928) 278 U.S. 116. Similarly, respondents' argument would undermine James v. Valtierra (1971) 402 U.S. 137, where constitutionality of a scheme providing for referendum by the voters of the City of San Mateo was upheld, even though the public housing project there in issue could not possibly affect more than a small fraction of them.

As this Court explained in James, supra, giving all the people in a community a voice in decisions that will affect the future development of that community does not deny equal protection (402 U.S. at 143). On the contrary, that is the democratic process in action.

CONCLUSION

While in the preceding pages petitioners refute arguments made by respondents, one should also emphasize one argument conspicuous by its absence. Petitioners urge again that there is simply no one before the Court with standing even to raise the grave constitutional issues so cavalierly dealt with by the court below (see Pet. Hrg., pp. 21-22). That deficient aspect of this case remains unchallenged and indefensible.

Intervention by this Court is urgently needed to review on the merits the patently erroneous and mischief-laden opinion below.

Respectfully submitted,

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